Provisional

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Provisional summary record of the 3433rd meeting
Held at the Palais des Nations, Geneva, on Thursday, 19 July 2018, at 10 a.m.

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Present:

Chair:	Mr. Valencia-Ospina
Members:	Mr. Argüello Gómez
	Mr. Aurescu
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Hmoud
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Mr. Nolte
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Wako
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 10.05 a.m.

Programme, procedures and working methods of the Commission and its documentation (agenda item 12) (*continued*)

The Chair proposed, in the light of consultations with the enlarged Bureau, that the topic "General principles of law" should be included in the Commission's programme of work and that Mr. Vázquez-Bermúdez should be appointed as Special Rapporteur.

It was so decided.

Succession of States in respect of State responsibility (agenda item 10) (*continued*) (A/CN.4/719)

The Chair invited the Commission to resume its consideration of the second report of the Special Rapporteur on the topic of succession of States in respect of State responsibility.

Mr. Jalloh, thanking the Special Rapporteur for a thoughtful second report, said that he largely agreed with the substance of the views expressed by those of his colleagues who had already taken the floor, in particular Mr. Park, Mr. Murase, Mr. Murphy, Mr. Reinisch and Sir Michael Wood. From the debate on the topic in 2017, it had appeared that some Commission members and delegations in the Sixth Committee considered the topic to be important and believed that its inclusion in the Commission's programme of work would help to clarify the applicable legal rules in a rather complex and politically sensitive area of international law. However, as detailed in paragraph 64 of the topical summary of the discussion held in the Sixth Committee (A/CN.4/713), some delegations had expressed doubts as to the usefulness and timeliness of the topic. Some Commission members, including Mr. Murase, had echoed those doubts the previous day. It was noted in the topical summary that, in the view of some delegations in the Sixth Committee, the complexities of the topic and the absence of clearly established customary international law rules in that area made codification of rules difficult, if not impossible, in practice. The Special Rapporteur had acknowledged the controversial nature of the topic and the limited State practice in that area. His "flexible" approach to the topic, which would take into account the collective nature of the Commission's work, was therefore to be welcomed.

The Special Rapporteur's approach should enable the Commission to produce work that was useful to all States, despite the fact that, as noted in paragraph 16 of the report, cases of State succession were relatively rare and State practice in that respect was diverse, context-specific and sensitive. Ultimately, as noted in paragraph 13, there was "a need for international law to serve as a framework to ensure legal security and stability in international relations".

He agreed with the Special Rapporteur's recommendation that the Commission should postpone its discussion of draft articles 3 and 4, which concerned the role of agreements and unilateral declarations, respectively. They should be held in the Drafting Committee until the other draft articles on the topic, in particular those articulating general rules on succession of States in respect of State responsibility, had been provisionally adopted. Only afterwards would the Drafting Committee and the Commission be in a position to decide on the final wording and placement of the draft articles previously proposed.

Like many other Commission members, he welcomed and endorsed the Special Rapporteur's revised position regarding the rule of non-succession of State responsibility, which was based on the premise that it was not for him or the Commission to suggest replacing one highly general theory of non-succession by another similarly general theory in favour of succession.

Lastly, he fully agreed with the Special Rapporteur's use of existing treaty language in the formulation of the draft articles, specifically the language of the 1978 Vienna Convention on Succession of States in respect of Treaties and the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts. That approach could be beneficial and added legitimacy to the discussion of the topic. However, it should

be borne in mind that, as noted in paragraph 8 of the report, the number of States that had ratified those conventions was relatively small. Although the reasons for that broad lack of acceptance remained unclear, it should nevertheless be taken into consideration, as should developments that had since taken place and the specific context of the Committee's work on the topic of succession of States in respect of State responsibility. He agreed that the Commission should also take into consideration the content of its articles on responsibility of States for internationally wrongful acts, using both inductive and deductive methods, as required, while also asking whether, and if so to what extent, that content also applied in situations of succession of States. The Commission's completion of that task could actually be the key added value of its work on the topic.

He wished to commend the Special Rapporteur on the manner in which he had presented the draft articles proposed in his report. It was always helpful if the draft provisions proposed in a report were printed immediately after the relevant analytical sections. That style of presentation allowed the Commission and States to understand the logic of the proposals.

Draft article 5, which introduced a general rule on the legality of succession under international law, should be uncontroversial. It was not only supported by sound and convincing analysis, but was also based on text that had already been endorsed by States, namely article 6 of the 1978 Vienna Convention and article 3 of the 1983 Vienna Convention. That text was supported by General Assembly and Security Council practice, including General Assembly resolution 2024 (XX) and Security Council resolutions 216 (1965) and 217 (1965). As the Special Rapporteur had noted, draft article 5 was a "modest provision" that would help to avoid any misunderstandings regarding the scope of application of the draft articles. In his view, the interpretative problems mentioned in paragraph 28 of the report could be addressed in the commentary.

Draft article 6, which sought to put forward a general rule, was a little cumbersome and unclear, as several Commission members, including Mr. Murphy, had already noted. The Special Rapporteur gave a fairly theoretical overview of various general rules relating to State succession and State responsibility. He highlighted the character of a breach and its relation to a successor State's responsibility. That analysis did seem helpful. The structure of draft article 6 also raised a number of questions. Overall, however, the proposed draft article was very good, and he generally agreed with it on the substance. Like Mr. Murase, he wondered whether better and simpler phrasing could be found. For example, draft article 6 (1) could read: "State responsibility for an internationally wrongful act committed before the date of succession of States is attributable to the predecessor state." He also wondered whether draft article 6 could not be restructured so as to make it more accessible to the non-specialist.

He was in favour of referring all seven proposed draft articles to the Drafting Committee for further consideration.

Mr. Hmoud said that, in his comprehensive and well-researched second report, the Special Rapporteur had carefully analysed relevant examples from jurisprudence, practice and treaty law in order to establish a basis for his proposed draft articles. It was important to note that the Special Rapporteur had taken into account the comments made by Commission members in the plenary debate and by delegations in the Sixth Committee regarding the need to reframe the key proposition underpinning the theory of succession in respect of State responsibility. In paragraph 16 of the report, the Special Rapporteur confirmed that the general rule was non-succession of State responsibility. Several of the provisions of the draft articles proposed in the second report did indeed attest to that proposition. However, the analysis contained in the report and the exceptions proposed seemed to indicate that the Special Rapporteur had decided to scale back the application of that general rule to such an extent that it had essentially been emptied of its content. The impact of that decision was most apparent in draft articles 10 and 11, but it could also be seen in some of the other draft articles. The cases cited and the examples of agreements and treaties provided did not constitute a firm basis on which to reverse the general rule of non-succession. Those examples had already been discussed at length, and the Commission would reach the same conclusion if it discussed them again, even in the context of specific situations of succession, such as secession, newfound independence, cession, unification or

dissolution. Accordingly, he urged the Special Rapporteur to reconsider his approach and to revise the draft articles so that they accurately reflected the general rule of non-succession and so that any exceptions rested on a firm basis.

The deliberations in the Sixth Committee in 2017 had shown that the topic and the Commission's work on it continued to evoke considerable scepticism. One of the issues raised in that context was whether the Commission should be engaged in the progressive development of rules or in their codification. Nevertheless, even the advocates of progressive development had emphasized that the Commission should base its work on existing practice. In his view, the Commission could perform both functions, provided that there was a strong trend in favour of the development of specific rules for specific situations. However, it did not follow that the Commission should base its work on policy preferences that served certain legal interests and not others, that such preferences should cause existing law to be overturned, or that new law should be created not only *de lege ferenda* but for its own sake.

With regard to the work of the Institute of International Law, he believed that, although the Commission should consult the work of other bodies of international law experts, its own mandate was distinct. The Commission's mandate was established in its Statute, which placed conditions on its work and the outcomes of its work. Other bodies of international law experts were able to exercise greater freedom in reaching their outcomes. In addition, whereas the products of the Commission's work were submitted to the General Assembly for adoption, other bodies were not subject to the same level of scrutiny. States remained the key arbiters of the value of the Commission's work, which was the reason for its authority in the eyes of courts and tribunals. The Commission should therefore take great care in reaching its conclusions, which would require it to base its work on existing practice and to refrain from advancing policy preferences.

He agreed with the argument made by the Special Rapporteur in paragraph 17 of his report that the Commission did not necessarily have to base its general approach on the 1978 and 1983 Vienna conventions. The topic of succession of States with respect to State responsibility raised different issues, and the underlying concepts and practice were associated more with the law of State responsibility than with the law of treaties and the international rules governing State debts and archives.

That brought him to a second point on methodology. The draft articles should not undermine the general rules contained in the Commission's articles on State responsibility. The value of those articles was well recognized by the international and national courts, as well as in State practice, as they reflected customary international law. He hoped that the Special Rapporteur's characterization of the articles as "non-binding" did not presage a departure from their rules, in particular article 1, which was their cornerstone, and article 2, on the elements of an internationally wrongful act of a State. He was concerned that several of the key propositions contained in the Special Rapporteur's second report departed from the key constituent element of an internationally wrongful act, namely the attribution of the act to the State that had committed it. Indeed, one came to the conclusion that several of the proposed draft articles disposed of the requirement that a wrongful act had to be attributed to the wrongdoer in order to trigger that State's responsibility. Instead, a successor State would be assuming obligations arising from a wrongful act that it had not committed. While such a State might under certain circumstances be required to fulfil certain obligations of a predecessor State, the law of State responsibility was not the basis for the assumption of such obligations. Such issues could be discussed in the context of the formulation of the draft articles, but other alternatives should seriously be considered, including the possibility of "no prejudice" clauses on the applicability of other regimes or rules of international law. Greater emphasis should also be placed on agreements whereby a successor State assumed certain obligations on behalf of predecessor States.

The Special Rapporteur's decision to limit the consequences of responsibility to reparation had not been explained. It was also not clear why the Special Rapporteur had excluded other aspects of State responsibility, for example the circumstances precluding wrongfulness, the consequences of serious breaches or the implementation of responsibility. Although draft article 6 did deal with the invocation of responsibility, it did not do so in a holistic manner.

With regard to the legality of succession, the report advanced good arguments in favour of limiting the application of the draft articles to situations of legal succession, including the fact that both the 1978 and 1983 Vienna conventions applied only to situations of lawful succession. He would point out that there was a difference between the recognition of an unlawful situation, such as succession resulting from an unlawful use of force, and the consequences in terms of responsibility. However, in reality, many situations of succession stemmed from the unlawful acquisition of a territory that, over time, had become recognized. While the Commission should not wish to encourage the recognition of such unlawful succession, he was not sure that it should exclude its effects outright, not least because many modern States had originally been established by unlawful succession, had illegally absorbed other territories into their own or had employed force to unify or dissolve other States. Nonetheless, if the Commission saw fit to exclude such unlawful succession, the language of draft article 5 was clear enough to embody that principle.

The Special Rapporteur seemed to support the basic tenet of State responsibility, namely attribution, particularly with regard to the situation of a continuator State. Nonetheless, he had departed from that essential element of responsibility, even though it had been included in draft article 6 as a general rule. The report included a discussion of two situations of particular importance to succession of responsibility, namely breaches of a continuing character, which were dealt with in draft article 6 (3), and the situation of a composite act, which was not dealt with in the draft articles, at least explicitly. He was not opposed to that approach, but he did not understand the need to include a separate provision on acts having a continuing character, particularly as such an act triggered the responsibility of the successor State on the strength of its own unlawful conduct alone. However, his main issue was with the way in which attribution was dealt with in draft article 6 (1), which provided that succession of States had no impact on the attribution of an internationally wrongful act committed before the date of succession. That provision did not add anything. Instead, what it did was to prepare the ground for making the attribution of a wrongful act a secondary matter for establishing responsibility in the case of State succession. It should be stated clearly that responsibility for a wrongful act in cases of succession of States arose only for the State that had committed that wrongful act.

Draft article 6 (2) undermined the general rule of non-succession. Moreover, it limited the invocation of responsibility to the claim of reparations. It was not a general rule on non-succession, but a formulation that was not based on the preceding analysis in the report. He would urge the Special Rapporteur to produce a clear and direct draft article that would expressly provide for the rule of non-succession as a general rule and not only for situations of a continuator State.

That brought him to draft article 6 (4), which incorporated an exception into the general rule. That paragraph allowed the injured State to claim reparation from the successor State for a wrongful act committed by the predecessor State in the situations covered by the subsequent draft articles. He could not see what purpose was served by including that paragraph in draft article 6, which was entitled "General rule". He therefore supported deleting draft article 6 (4) altogether. If there were legitimate exceptions, such as the case of wrongful acts of an insurrectional movement that had established a new State, they could be provided for in the relevant draft articles, namely draft articles 7 and 8. However, the case of an insurrectional movement could hardly be considered an exception.

That brought him to part three of the report, which was intended to justify a departure from the general rule of non-succession and the requirement to attribute the wrongful act to the wrongdoer as the basis for an obligation. The Special Rapporteur drew a distinction between situations in which a predecessor State had continued to exist and those in which it had not. In the first of those categories, the Special Rapporteur accepted the general rule of non-succession of responsibility, with a number of exceptions and qualifications; in the second, however, the exception, namely succession of obligations, became the rule. With regard to the first category, draft article 7 dealt with the situation of secession, or separation of parts of a State. It was unclear how the general rule of non-succession or the exceptions to that rule had been derived from the Special Rapporteur's discussion of specific examples, including the case of the Austro-Hungarian Empire and that of the Soviet Union.

In paragraph 92 of the report, the Special Rapporteur had cited the work of the Institute of International Law in order to reach conclusions regarding the circumstances that justified deviation from the general rule. As detailed in paragraph 93, those circumstances included internationally wrongful acts committed by an autonomous entity of the predecessor State, a link between the wrongful act and the relevant territory, and the question of unjust enrichment. Those circumstances were supported not by relevant practice, but by doctrinal and scholarly writings, among which those of one author played a central role. Nevertheless, draft article 7 dealt not with wrongful acts by autonomous entities, but with wrongful acts by insurrectional movements, which were not the same and did not really constitute an exception.

In draft article 7 (3), a direct link between an internationally wrongful act of the predecessor State and the territory of the successor State was used to justify the assumption of obligations arising from that act. Once again, the report provided no evidence of practice in support of that proposition, although there might be a basis for progressive development outside the doctrine of State responsibility. The question remained whether it would be fair to oblige a State to assume obligations arising from the wrongful act of another State, even if there existed a link between that act and the territory of the new State. Nor was any evidence provided in the report to support the proposition of the transfer of obligations arising from the wrongful act of an organ of a predecessor State that had become part of the successor State. The question of unjust enrichment had not translated into a provision in the draft articles, but he suspected that it underpinned draft articles 10 and 11. However, in civil law systems, unjust enrichment was not an element or a circumstance but was an independent source of obligations, like torts and contracts. If the matter fell under *de lege ferenda*, he would suggest that the Special Rapporteur should specify that unjust enrichment was a source of obligations.

His views on draft article 7 also applied to the structure and content of draft articles 8 and 9. In addition, draft article 8 (2), on newly independent States, provided that, if a State agreed, the obligations arising from the wrongful act of the predecessor State could be transferred to the successor State. However, it was added that "particular circumstances" could be taken into consideration. He was not sure whether such circumstances were relevant if a newly independent State agreed to assume responsibility on behalf of the predecessor State. For that reason, the first part of the paragraph should be a separate provision from the second. As for the particular circumstances themselves, the example of Morocco was not sufficient to establish practice in favour of creating a rule in favour of succession for newly independent States. The other examples given, including the example of the actions of the Front de Libération Nationale in Algeria, were relevant to draft article 7 (3), on the conduct of national liberation movements, although nothing in those examples indicated that a newly independent State assumed responsibility on behalf of a predecessor as a matter of general international law.

In addition, in succession situations, whether the predecessor State existed or not, the successor States could assume obligations arising from the responsibility of the predecessor State for political reasons rather than from a sense of legal obligation. Such political considerations should not be interpreted as an indication of *opinio juris* in favour of a general rule on succession.

Turning to cases of succession in which the predecessor State did not exist, which were dealt with in paragraphs 147 and 148 of the report, the Special Rapporteur had asserted, as a policy preference, that obligations arising from the wrongful act of a predecessor State should be assumed by a successor State on the basis of the principles of equity and justice. That preference was described in the report as a "presumption of succession" that could be rebutted by an agreement between the States concerned, although it was essentially not a presumption but a general rule on succession that could be superseded by the special rules in an agreement on the assumption and sharing of obligations. He agreed with other Commission members that policy considerations and an assertion of a sense of justice and equity were not sufficient grounds on which to amend the general rule of non-succession. Even though the proposed rule dealt only with the assumption by a successor State of the consequences of a wrongful act of a predecessor State, there was no legal basis for it. Attribution remained a cardinal element of the

assumption by the wrongdoer of responsibility for a wrongful act. He could not see how it was fair that a new State that was not responsible for a wrongful act committed by a predecessor State should assume responsibility for the consequences of that act. Of course, the new State could assume obligations arising from the wrongful act of another State either by agreement or by a unilateral declaration. It might wish to do so for reasons of political convenience, but not from a sense of legal obligation.

The examples provided in the report, from paragraph 149 onwards, were based either on agreement or on unilateral acts, but none of them pointed to the existence of a general rule on succession. He was not sure on what legal basis the Special Rapporteur had concluded, in paragraph 185 of his report, that the legal obligations arising from the wrongful act of a State did not disappear with its dissolution. Moreover, as the Special Rapporteur recognized in the same paragraph that it was unclear to which of the successor States the obligations arising from an internationally wrongful act passed and to what extent, he could not see how a presumption of transfer of obligations could be created. In paragraph 189, the Special Rapporteur noted that it currently seemed impossible to determine with sufficient clarity all the factors that should be taken into account in order to apportion responsibility among successor States. Nevertheless, the Special Rapporteur was effectively taking that approach anyway, and it was doubtful that such an approach was right and just.

In view of that, he was prepared to support the referral of draft articles 10 and 11 to the Drafting Committee, provided that the Drafting Committee was permitted to alter the underlying rule. With regard to draft article 11 (2), he found the Special Rapporteur's proposition regarding the need for good faith negotiations acceptable.

He recommended referring draft articles 6 to 11 to the Drafting Committee.

Mr. Petrič said he welcomed the fact that, in his excellent second report, the Special Rapporteur had taken account of the Commission's debate on the topic at the previous session and the discussion in the Sixth Committee, which had resulted in quite a significant change in the Special Rapporteur's thinking as compared with his first report. The topic was indeed a controversial one, as was reflected in the diverse, albeit limited, practice of States. The lack of practice had also been reflected in the reaction of States to the first report. As the last part of the international law on State succession to be codified, the topic had also recently been the subject of studies by the Institute of International Law and the International Law Association, both of which the Special Rapporteur had drawn on in his report. Of course, as Mr. Hmoud had noted, it must be recalled that the Commission was a subsidiary organ of the United Nations while the other bodies were private institutions and, as such, had different considerations to take into account.

The crucial research problem posed by the topic was the extent to which the general rule of non-succession in respect of State responsibility was limited by exceptions in certain legal situations and, consequently, which, if any, new rules concerning such exceptions had been or might be established as progressive development of international law. In his view, for new rules to depart from the general rule of non-succession, they should be exceptional and should clearly reflect State practice, not merely wishful thinking on a matter of doctrine. One or two court decisions or cases in practice were not sufficient, particularly as the former did not create law but merely helped to identify it. It was risky to try to convert specific *sui generis* regulations into general rules of international law or, as in the case before the Commission, rules concerning exceptions. For example, the unification of Germany could not be considered to establish a general rule of unification and, consequently, could not form a legal framework for the possible unification of Korea at some time in the future. As most of the examples of succession were unique, a very careful approach was required to deduce rules and exceptions from them. The comments made in that respect by Mr. Rajput, Mr. Reinisch, Mr. Hmoud and others had been very pertinent.

His own position concerning the "softening" of the rule of non-succession in respect of State responsibility and the introduction of the rule of succession, even if only in exceptional cases, was very conservative. Only cases that reflected common practice and existing, or at least self-evidently emerging, new customary international law could provide sufficient proof to establish exceptions from the general rule of non-succession. In that

context, he supported the view expressed by the Special Rapporteur in paragraph 16 of the report, namely that he was not suggesting replacing one highly general theory of non-succession with another similarly general theory in favour of succession and that a more flexible approach was needed. As the Commission was drafting a set of articles for a possible future convention, rather than draft guidelines, principles or conclusions, it should exercise particular caution and only establish exceptions that were based on solid State practice. In his report, the Special Rapporteur presented cases involving continuing breaches and insurrectional or other movements as exceptions to the general rule which were to be established through special rules. In order for the various exceptions provided for in draft articles 6 (3), 7 (2), 7 (3), 8 (2), 9 (2) and 9 (3) to be established as exceptional legal rules, they must be based on the practice of States.

Those exceptions from the general rule of non-succession involved cases where the predecessor State that had committed the wrongful acts continued to exist. The Special Rapporteur elaborated on them using several examples, but those examples were limited in number and often reflected contradictory practices. In his view, based on State practice, the rule of non-succession should be upheld if the predecessor State to which a wrongful act had been attributed still existed. If, however, responsibility for the wrongful act was to be exceptionally transferred to the successor State, that could only be done through an agreement or, if the predecessor and successor States had agreed to seek a judicial resolution, a judicial decision. The Special Rapporteur should perhaps pay more attention to the role of agreements between the still-existing predecessor State and the successor State or States, and to the effects of judicial decisions. The still-existing predecessor State and successor States could resolve any matters of succession, including those related to State responsibility, through an agreement. Such an agreement could replace the rules of international law on succession, which were not rules of *jus cogens*. The Commission should thus confirm the subsidiary nature of the rules of succession, in particular rules concerning any exceptions that might be established.

Regarding cases where the predecessor State no longer existed, in draft article 10 the Special Rapporteur stipulated that, in the case of unification, the obligations of the predecessor State "passed" to the successor State. Thus, the rule of non-succession seemed to be replaced by a rule of succession. However, according to draft article 10 (3), with which he agreed, an agreement among the States concerned, including an injured State, could replace the rules of succession. He agreed with most of the critical comments that had been made by previous speakers in respect of the draft articles, especially draft article 10, dealing with succession when the predecessor State no longer existed.

In draft article 11 (1), the Special Rapporteur stipulated that, in cases of dissolution of a State, the obligations arising from an internationally wrongful act of the predecessor State "passed", subject to an agreement, "to one, several or all the successor States", thus evidently introducing the rule of succession. However, when it came to the agreement, the Special Rapporteur seemed, with good reason, to be more cautious, stipulating in draft article 11 (2) that successor States "should negotiate in good faith with the injured State and among themselves". Were new successor States — new legal persons with no legal continuity with the previous legal person, the predecessor State — actually obliged to negotiate responsibility for acts committed by the predecessor State before they had even come into being as legal persons? There might be political reasons for doing so, but as new international subjects they were not legally bound to accept any responsibility for the acts of the predecessor State. It seemed that in the case of dissolution, the general rule of non-succession should be confirmed, without any exceptions, as there was not sufficient relevant State practice.

The successor State or States and the injured State could, of course, always reach a solution by way of an agreement. In that respect, he agreed with Mr. Reinisch's conclusion that endeavouring to protect the interests of the injured State by establishing the responsibility of the successor State through application of the succession rule could result in an unacceptable rule of transfer of responsibility and attribution to a new State in respect of a wrongful act it had not committed. Responsibility for a wrongful act could not be transferred legally to a State that had not even existed as a legal person at the time the wrongful act had been committed unless it agreed to the transfer.

In his view, the Special Rapporteur's treatment of the issue of legality of succession in paragraphs 22 to 41 was useful and correct. He agreed with proposed draft article 5 which, like article 6 of the 1978 Vienna Convention, stipulated that the draft articles applied only to the effects of a succession of States occurring in conformity with international law. However, he disagreed with the views presented in the doctrine and mentioned in the report concerning legal neutrality. Under international law, all legally relevant acts were either legal or illegal. In the event of a legal lacuna, legality or illegality should be established by means of interpretation or analogy or by a court decision.

He supported the Special Rapporteur's suggestion to postpone further discussion of draft articles 3 and 4, on the relevance of the agreements to succession of States in respect of responsibility, and to deal with them only after the general rules on succession of States in respect of State responsibility had been provisionally adopted.

He had no objection to sending all the proposed draft articles to the Drafting Committee, which could deal with the various inconsistencies therein and provide the necessary terminological clarifications. The Drafting Committee should also decide, based on relevant State practice, whether all the proposed draft articles qualified as either progressive development or codification. He believed that articles 10 and 11 should either be redrafted in line with the general principle of non-succession or deleted. As currently drafted, they were not supported by State practice or legal logic.

Reviewing the draft articles in greater detail, he said that draft article 5 was an important and well drafted provision. Draft article 6 (1) and (2) confirmed the general rule of non-succession, which should be clearly presented in paragraph 1 without referring to the separate problem of attribution. He therefore proposed that paragraph 2 should become paragraph 1 and that the current paragraph 1 should be deleted. As currently drafted, paragraphs 1 and 2 referred to "the date of succession", which might be disputed, as it had been in the case of the successor States of the former Socialist Federal Republic of Yugoslavia. The date of succession was, however, important, and should at least be clarified in the commentaries. In draft article 6 (3), the "continuing character" of an act was cited as an exception to the general rule; that concept should also be clarified in the commentaries. In his view, the last phrase in paragraph 3 — "if it is bound by the obligation" — was unclear and superfluous.

Concerning draft article 7, on separation of parts of a State, he agreed with several previous speakers that it was not necessary or appropriate to use the term "secession" in the title. It was not clear what the "particular circumstances" mentioned in paragraphs 2 and 3 might be. In paragraph 2, it was unclear whether the words "will transfer" implied an obligation or simply an expectation, and he wondered whether there was any legal reason why elsewhere in the draft articles the word "pass" was used rather than "transfer". The concept of "an organ of a territorial unit of the predecessor that has later become an organ of the successor State", in paragraph 2, should be clarified in the commentaries, using the very useful and pertinent explanations presented in the report. In paragraph 3, it was necessary to clarify what was meant by "obligations ... are assumed by the predecessor and the successor State". How, and in what proportion, were the obligations arising from an act of the predecessor "assumed", and did the word "assumed" have a specific legal meaning different to "transfer" or "pass"?

Several elements of paragraph 4 of draft article 7, on the conduct of an insurrectional or other movement that led to the creation of a new State, needed to be clarified, as it was an important issue and, at least to him, one of the most intriguing possible deviations from the general rule of non-succession. He agreed with the Special Rapporteur's decision not to distinguish between different kinds of insurrection as long as they resulted in the creation of a new State, and agreed that the basis for the transfer of responsibility lay in the continuity between the insurgent movement and the eventual Government of the new State. The reasons for the distinction between "insurrectional" movements in draft article 7 (4) and "national liberation" movements in draft article 8 (3) should be explained in the commentaries.

Although its title was "Newly independent States", draft article 8 actually dealt with cases of decolonization and was, to a certain extent, in contradiction with draft article 11,

on dissolution of a State. In both cases there was a new successor State, but in draft article 8 the predecessor State still existed, while in draft article 11 it did not. In the case of draft article 8, the non-succession rule was basically confirmed, whereas in draft article 11 the rule of succession in respect of State responsibility was introduced. Paragraph 2 of draft article 8 established exceptions to the non-succession rule in a very cautious way by using wording that was not really suitable for a draft article, such as "if the newly independent State agrees" and "obligations … may transfer". Those formulations could be improved in the Drafting Committee.

Draft article 9 dealt with "cession" — the transfer of part of the territory of a State to another State. It was unclear what was meant in paragraph 3 by the wording "obligations arising from an internationally wrongful act … are assumed by the predecessor and the successor State". If it implied an obligation of the successor State to assume obligations, that would be in contradiction with paragraph 1 of the same article, since it would be a departure from the rule of non-succession.

Article 10 confirmed the rule of succession in respect of State responsibility in cases of the unification of States into a new State or the incorporation of one State into another. The Special Rapporteur distinguished between unification and incorporation, which, despite surprisingly significant legal differences, produced the same legal effect according to draft article 10: the obligations passed to the successor State. The idea of an agreement was introduced in paragraph 3 and should be introduced *mutatis mutandis* in other corresponding draft articles to confirm the subsidiary character of the draft articles.

Draft article 11 seemed to him the most disputable, particularly bearing in mind the practical case of the dissolution of the former Socialist Federal Republic of Yugoslavia, of which he had had considerable personal experience as a participant in the negotiations on succession and later as permanent representative to the United Nations in New York. At the time, the main concern had been to prevent Serbia and Montenegro from succeeding in establishing their continuity as legal persons in the United Nations. The question of whether or not there was continuity of one successor State or whether they were all equal successor States had taken 10 years and tremendous political changes to be resolved. Such matters could be very sensitive and complicated. The reasoning provided in the report to explain the idea in paragraph 1 of draft article 11 was not sufficiently persuasive. The draft article implied the introduction of the rule of automatic succession by stipulating that, subject to an agreement, the obligations arising from the commission of an internationally wrongful act of the predecessor State passed to one, several or all the successor States. Did the obligations "pass" to States that had not even existed at the time the internationally wrongful act had been committed? Hypothetically speaking, if that rule were applied in the context of a genocide committed by the predecessor State prior to dissolution against the population in the territory of its successor States, the successor States would share responsibility for the genocide simply because the predecessor State no longer existed. That would, in his view, be a denial of justice and contrary to legal logic. It should be clarified whether the obligations passed to the successor States only through an agreement or also without one.

According to paragraph 2 of draft article 11, successor States "should" negotiate, but it was not clear what would happen if they did not and no agreement was reached, and whether they were expected to negotiate only to settle the consequences of the internationally wrongful act that they had not committed or to establish whether responsibility had been passed to them. In his opinion, if draft article 11 was retained, it should be redrafted to reflect the non-succession rule by deleting the word "pass" in paragraph 1 and simply recommending that the new States and the injured State should enter into negotiations. He understood that the Special Rapporteur's intention had merely been to ensure that, in the event of the dissolution of a State, responsibility for its wrongdoing did not simply disappear. However, attempting to resolve the problem of succession of responsibility by simply shifting it to a successor State that had no legal continuity with the predecessor State seemed unjust, unacceptable and, most importantly, far from being sufficiently confirmed in State practice. He agreed with Mr. Reinisch's comments on that point.

Concerning future work, he fully agreed with the Special Rapporteur's suggestions and, given his diligence and speed, believed the Commission might indeed complete the first reading in the current quinquennium.

Mr. Hassouna said that the Special Rapporteur should ensure that all terms which required definition were included in draft article 2 (Use of terms). Given that the Special Rapporteur drew heavily on the language of the 2015 resolution of the Institute of International Law on succession of States in matters of international responsibility, the Commission should pay close attention to any expansions on, or departures from, the provisions of the resolution, to ensure they were well-founded. Very careful attention should also be paid to the thorny question of categorizing instances of secession. The International Law Association had already noted the difficulties of adopting clear-cut criteria for the distinction between secession and dissolution of State when there was no agreement among the States concerned. The commentary should therefore focus on practical considerations and avoid lengthy theoretical or controversial arguments such as those to be found in paragraphs 87 and 88 of the report. Parts of the report, especially chapter IV, section D, relied heavily on European sources of State practice. The Commission should not, however, codify a general rule based solely on the practice of European States. On the contrary, in response to requests from States in the Sixth Committee, it should consider examples of succession of States following independence from colonial rule, secession or unification in Africa, Asia and the Americas. It was important to provide a comprehensive review of State practice in relation to succession of States if the Commission's work was to have worldwide relevance. He therefore seconded Sir Michael Wood's suggestion that additional information should be sought from States, or that the secretariat should be asked to prepare a memorandum on the subject.

It was unclear whether the Special Rapporteur intended to prepare two separate sets of draft articles on obligations and rights. As international legal scholars had acknowledged, many obligations were the mirror images of rights. That might explain why the 1978 Vienna Convention and the aforementioned resolution of the Institute of International Law dealt with both obligations and rights in the same articles. The Special Rapporteur endeavoured to distinguish between the rules drawn from State practice on obligations and the rules drawn from State practice on rights. If, however, the dearth of State practice presented particular challenges, it might be useful to consider State practice on rights in the context of obligations, in order to create comprehensive, well-supported draft articles encompassing the interlinked concepts of rights and obligations.

Although draft article 6 mentioned only the obligation of reparation, that limitation on the obligations deriving from the responsibility transferred to the successor State did not appear elsewhere in the draft articles. The extent of such obligations should be clarified in the text of the draft articles or in the commentary. The number of exceptions to the general rule of non-succession posited by the Special Rapporteur was so great that it was questionable whether that rule was really supported.

Despite the fact that the Commission needed to be especially responsive to the views of States on matters of succession in view of the limited success of the Commission's earlier work on other aspects of the topic, in his second report the Special Rapporteur had not addressed States' comments on the form to be taken by the outcome of the Commission's current work. While that was something which could be decided at a later stage, the Special Rapporteur must heed States' views. While many scholars and legal bodies were of the opinion that the 2001 articles on responsibility of States for internationally wrongful acts reflected customary international law, States had taken no further action on them. The Commission should therefore tread carefully when referring to them in the commentary to a topic which expanded on them.

Draft article 5 was uncontroversial as its wording was drawn from the 1978 Vienna Convention and the 1983 Vienna Convention. The clarification contained in paragraph 28 of the report that drafters of the aforementioned Conventions had not intended to establish two kinds of succession, namely lawful and unlawful, dispelled the uncertainty in that respect which had been expressed by States in the Sixth Committee, and should therefore be included in the commentary. It was unnecessary to address the possibly controversial subject of legal or illegal succession in the draft articles themselves. On the other hand, it

would be useful to specify in draft article 6 that the internationally wrongful acts covered by the draft articles were those committed by the predecessor State before the date of succession. Although that might be the logical inference which could be drawn from the reference to "acts committed before the date of succession", that clarification was essential in respect of situations of State succession where the predecessor State continued to exist.

Draft article 6 served as a general rule. Some members had questioned the relevance of rules on attribution to a topic which focused on obligations stemming from responsibility, whereas the Special Rapporteur had explained in paragraphs 48 to 50 of the report that the successor State would have significantly different obligations depending on whether an internationally wrongful act was attributed to a successor or a predecessor State. It would therefore be helpful if the Special Rapporteur could clarify the relevance of attribution to the draft articles and to distinguish clearly between attribution and obligations related to responsibility. It might be wise to consider formulating a single draft article on attribution which set out all the rules pertaining to it, including those concerning insurrectional or other movements, highlighted the different implications of the two principles for the successor State's legal obligations and emphasized that attribution played a determining role when subsequently invoking responsibility. The scope of attribution could be qualified in either the text of the draft article or the commentary.

Article 14 of the articles on State responsibility reflected the fact that a State's international obligations might require it to act or to prevent action. For that reason, draft article 6 (3) should cover breaches of international obligations resulting not only from acts but also from omissions of a continuing nature. The phrase "by an act" should therefore be deleted and the commentary should explain that international obligations could be affirmative or preventive and that the successor State's responsibility for continuing obligations of a preventive nature was without prejudice to any transfer of treaty-based obligations based on the applicable rules on the succession of States in respect of treaties. In theory, there might be two general rules on succession of States, but the general rule which would apply in reality would depend on the factual circumstances surrounding the succession of States at issue and on whether the rights and obligations flowing from State responsibility stemmed from a breach of a treaty based on customary international law obligations.

Draft articles 7 to 9 each dealt with three instances of State succession where the predecessor State continued to exist. Although secession, independence and transfer of territory were all subject to the general rule of non-succession, the Special Rapporteur identified three factors which might justify a departure from that rule: the existence of a link between the consequences of an internationally wrongful act and the territory or population of the successor State; instances where the author of the internationally wrongful act was an organ of the predecessor State and subsequently became an organ of the successor State; and instances where a newly independent State accepted a transfer of obligations arising from the internationally wrongful act of the predecessor State. The last factor was included only in draft article 8, whereas it might also be relevant to the situations for which provision was made in draft articles 7 and 9. The Special Rapporteur had not explained why no reference was made to agreements in draft articles 7 and 9, when in paragraph 93 of the report he had deemed agreements to accept obligations to be usual exceptions to the general rule of non-succession. In fact, the central role of agreements in State succession should be clarified, as it was relevant to the topic as a whole.

As draft articles 7 and 9 were worded almost identically, it might be advisable to combine them under the heading "Separation or transfer of part of the territory of a State". The commentary could then explain that those situations encompassed secession and transfer of territory. The phrase "if particular circumstances so require" was open-ended and should also be elucidated in the commentary.

Draft article 8, on newly independent States, was still relevant, since it was of historical importance for former colonies and the United Nations still maintained a list of non-self-governing territories. Moreover, the General Assembly had declared the period 2011–2020 the Third International Decade for the Eradication of Colonialism. The different principles underlying succession of States in the contexts of secession and of newly independent States should be explained in the commentary. In the case of newly

independent States which had emerged from colonial rule, succession was based on the principle of self-determination. The freedom of that State to make its own choice with regard to its succession to its predecessor's rights and obligations was of the utmost importance in the context of decolonization. The draft article could, however, be condensed by placing the contents of the second sentence of the second paragraph in the commentary and by replacing the first and second paragraphs with: "The obligations arising from an internationally wrongful act of the predecessor State do not pass to the successor State in case of establishment of a newly independent State unless voluntarily assumed by the successor State." In the third paragraph of draft article 8, the phrase "national liberation or other movement" should be replaced with the broader term "insurrectional or other movement", which clearly encompassed liberation movements, bearing in mind the fact that paragraph (9) of the commentary to article 10 on State responsibility referred to the "wide variety of forms which insurrectional movements may take in practice", citing, among the examples, an anti-colonial struggle or the action of a national liberation front.

The Chair invited Mr. Hassouna to complete his statement at the following meeting in order to allow time for representatives of the Council of Europe to address the Commission and to answer any questions which members might wish to put to them.

Cooperation with other bodies (agenda item 14) (*continued*)

Visit by representatives of the Council of Europe

The Chair welcomed the representatives of the Council of Europe, Ms. Kaukoranta, Chair of the Committee of Legal Advisers on Public International Law (CAHDI), and Ms. Requena, Head of the Public International Law and Treaty Office Division and Secretary to CAHDI, and invited them to address the Commission.

Ms. Kaukoranta (Council of Europe) said that the Committee of Legal Advisers on Public International Law was composed of the legal advisers of the ministries of foreign affairs of the 47 Council of Europe member States and the representatives of 9 observer States and 10 participant international organizations. One of those organizations was the Asian-African Legal Consultative Organization (AALCO), which had recently been granted participant status and whose Secretary-General had attended the fifty-fifth meeting of the Committee in March 2018. That was a highly important development, in that for the first time an organization representing States from Asia and Africa had a voice on the Committee. The Committee provided a forum for coordinating, discussing and providing advice on ideas which were crucial to the development of international law. It likewise fostered cooperation and collaboration between the Council of Europe and the United Nations and maintained a dialogue with international courts.

CAHDI contributed to the development of public international law *inter alia* by examining reservations and declarations subject to objection in its capacity as the European Observatory of Reservations to International Treaties. The reservations dialogue offered States which had formulated a problematic reservation the opportunity to clarify its scope, to modify it or to withdraw it, and enabled other delegations to understand the rationale behind a reservation before formally objecting to it. She noted that States were once again tending to subordinate treaty provisions to their domestic law and to make greater use of reservations and declarations as a means of signalling their non-recognition of another State or reaffirming the existence of a territorial dispute. Both practices undermined the basic rules of treaty law and impeded the implementation of the standards and rules contained in conventions. CAHDI and the relevant entities of the United Nations should join forces to discourage such practices. The Commission's *Guide to Practice on Reservations to Treaties* was of great assistance to CAHDI, which had examined 19 potentially problematic reservations and declarations.

CAHDI likewise participated in the drafting group on the place of the European Convention on Human Rights in the European and international legal order. The drafting group had been set up in 2016 by the Committee of Ministers to examine the challenges of the interaction between the Convention and other branches of international law, including international customary law; between the Convention and other international human rights instruments to which Council of Europe member States were party; and between the

Convention and the legal order of the European Union and other regional organizations. The aim of that work was to preserve the efficiency of the treaty system and to avert the risk of fragmentation of human rights protection in the European and international legal areas as a result of diverging interpretations.

Traditionally the focus of the Committee's efforts to promote the peaceful settlement of disputes had been on securing States' acceptance of the compulsory jurisdiction of the International Court of Justice under Article 36 (2) of the Statute of Court. At its previous meeting, CAHDI had widened the scope of its deliberations to include other declarations recognizing the Court's jurisdiction, the case law of the International Tribunal for the Law of the Sea, inter-State arbitration and other instances of peaceful settlement of disputes between States.

A number of the Committee's current projects related to various aspects of immunity and might be of interest to the Commission. One concerned the settlement of disputes of a private nature to which an international organization was a party. The immunity of international organizations often prevented individuals who had suffered injury owing to the conduct of an international organization from bringing a claim before a domestic court. That immunity was being challenged on the grounds of its alleged incompatibility with the right of access to justice. The Netherlands had prepared a preliminary document based on States' replies to questions, which examined that issue in the context of peacekeeping and police operations.

CAHDI had also prepared a legal opinion on Parliamentary Assembly recommendation 2122 (2018), on jurisdictional immunity of international organizations and the rights of their staff. That opinion had rested on two main lines of reasoning. On the one hand, the privileges and immunities of international organizations served the legitimate purpose of protecting their independence, which was essential for the effective performance of their functions. On the other hand, given that the Council of Europe was responsible for setting international human rights standards and promoting the rule of law at all levels, it had a special duty to offer its staff timely, effective and fair justice. In that respect, it was settled case law of the European Court of Human Rights that in determining whether, under the European Convention on Human Rights, it was permissible to grant international organizations immunity from the jurisdiction of national courts, the key factor was whether "reasonable alternative means" were available to effectively protect the rights of applicants. CAHDI would be preparing another legal opinion at its September meeting, on the legal challenges related to hybrid war and human rights obligations.

The Declaration on Jurisdictional Immunities of State-owned Cultural Property was a non-legally binding document developed within the framework of CAHDI. It expressed a common understanding of *opinio juris* concerning the fundamental rule that a certain kind of State property — cultural property on exhibit — enjoyed immunity from any measure of constraint, such as attachment, arrest or execution, in another State. By signing the Declaration, a State recognized the customary nature of the relevant provisions of the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property, which had yet to enter into force. The Declaration had been signed by 20 ministers of foreign affairs of member and non-member States of the Council of Europe.

The input of CAHDI to discussions on topical issues of public international law was not limited to debate at its biannual meetings. Between meetings, evidence was collected from delegations concerning State practice on topics under consideration. Such data had already served as the basis for several publications, and a publication on immunities of special missions was being finalized. In 2013, CAHDI had agreed to prepare a questionnaire aimed at establishing an overview of legislation and specific national practices in the field of special missions. Replies had been received from 37 member and non-member States of the Council of Europe. Special missions sent by one State to another played an important role in international diplomacy, but the international law governing them remained somewhat uncertain. Determining whether a special mission had been established had direct implications for the immunities enjoyed by the members of such missions, including immunity from arrest and criminal jurisdiction. In that regard, she would like to express her appreciation to Sir Michael Wood and to Mr. Andrew Sanger, of the University of Cambridge, for preparing an analytical report based on the replies

received from States. Such initiatives illustrated the contribution that CAHDI made to disseminating the standards set out in United Nations conventions and to fostering ever closer cooperation and collaboration between the Council of Europe and the United Nations.

CAHDI attached fundamental importance to collaboration with the International Law Commission, given their shared goal of promoting the role of public international law in international relations. Input from the Commission to the work of the Committee was always welcome.

Ms. Requena (Council of Europe) said that the four priorities set by Croatia, as chair of the Committee of Ministers of the Council of Europe, were the fight against corruption, the efficient protection of the rights of national minorities and vulnerable groups, decentralization in the context of strengthening local government and self-government, and the protection of cultural heritage and cultural routes.

Within the Council, there had been various developments in the area of treaty law since the Commission's sixty-ninth session, particularly in relation to the European Convention on Human Rights. The most significant was the welcome withdrawal by the Government of France of its derogation under article 15 of the Convention on 1 November 2017, following the end of the state of emergency in that country. Although the derogation had been extended five times, the Government of France had acknowledged that a state of emergency could not remain in place indefinitely, even in the face of a continuing terrorist threat. The Government of Turkey was also expected to withdraw its derogation, which had been in place since July 2016 and extended seven times, in the very near future, leaving Ukraine as the only State with an active derogation from the Convention under article 15. The Turkish authorities had reported that all 31 decrees with force of law issued under the state of emergency had been approved by the Grand National Assembly of Turkey in accordance with article 91 of the Turkish Constitution.

Several cases concerning measures taken under the state of emergency in Turkey had reached the European Court of Human Rights. In four cases, applications had been declared inadmissible on the grounds that not all domestic remedies had been exhausted. Of a further six cases, concerning 17 journalists and media workers detained on suspicion of their alleged links with the Gülen movement and charged with criminal offences relating to terrorism, two had been adjudicated in March 2018. The Court had found violations of articles 5 (1) and 10 of the Convention but not article 5 (4). In its 2017 annual report, the Court had referred to a flood of applications lodged in the wake of the attempted *coup d'état* in Turkey, mainly in respect of journalists and judges taken into custody. More than 27,000 such applications had been declared inadmissible for failure to exhaust domestic remedies, including through the Constitutional Court and the Commission of Inquiry for State of Emergency Practices set up in January 2017. The European Commission for Democracy through Law (the Venice Commission) had adopted or was preparing several opinions relating to the state of emergency in Turkey.

The Committee of Ministers played a role in supervising the execution of judgments of the European Court of Human Rights. Four years previously, the Court had handed down a binding judgment in the case of *Ilgar Mammadov v. Azerbaijan*, finding that Mr. Mammadov's deprivation of liberty not only violated article 5 of the Convention, but also amounted to a violation of article 18, which prohibited the restriction of a Convention right for any reason other than those prescribed under the Convention. It was the first time since the entry into force of Protocol No. 14 to the Convention, in 2010, that a case of infringement had been referred back to the Court by the Committee of Ministers. A Grand Chamber had been constituted to address the question of whether a contracting party had failed to fulfil its obligation under article 46 (1) of the Convention, but an issue of impartiality had arisen: the President of the Court, Mr. Guido Raimondi, had made reference to the case in his speech at the opening of the Court's judicial year, which the Azerbaijani authorities had considered an indication of partiality. Mr. Raimondi had accordingly withdrawn as President of the Grand Chamber.

The Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data had been finalized and would be opened for signature in November 2018. In order to avoid any delay in its entry into force, it contained

final clauses providing for a degree of provisional application five years after it was opened for signature.

Conventions of the Council of Europe were open to accession by non-member States, and the number of non-member State accessions increased every year. Since the Commission's last session, there had been 30 accessions and signatures by 22 non-member States.

The fifth annual report of the Secretary-General of the Council of Europe, published in May 2018, focused on the state of democracy, human rights and the rule of law, and drew attention to a growing trend towards challenging judicial independence. Member States were increasingly seeking to exert political influence on judicial appointments, including the appointment of the President of the European Court of Human Rights. Some were challenging the primacy of the Convention or refusing to implement the Court's judgments for political reasons.

One of the strategic areas set out in the Council's Gender Equality Strategy for 2018–2023, adopted in March 2018, was the protection of the rights of migrant, refugee and asylum-seeking women and girls. Its Counter-Terrorism Strategy for 2018–2022, adopted in July 2018, had three main aims: preventing terrorism, prosecuting terrorists, and protecting persons and assisting victims. In the face of new threats to the rule of law in cyberspace, a protocol to the Convention on Cybercrime was being prepared. Evidence relating to cybercrime was increasingly stored on servers in foreign, multiple, shifting or unknown jurisdictions, but the powers of law enforcement were limited by territorial boundaries. It was hoped that the protocol would be ready by December 2019.

Sir Michael Wood drew attention to the welcome judgment of the Court of Appeal of England and Wales in *Freedom and Justice Party v. Secretary of State for Foreign and Commonwealth Affairs*, handed down earlier that day, in which the Court had recognized a rule of customary international law obliging States to grant immunity to members of special missions accepted and recognized as such. The ruling drew heavily on the output of CAHDI and the Commission, particularly in the areas of immunity and the identification of customary international law, and demonstrated the value of the work of those bodies in assisting domestic courts.

Mr. Reinisch said that, in his experience, the Declaration on Jurisdictional Immunities of State-owned Cultural Property had played an important role in a number of domestic cases. The interesting tendency of domestic courts to treat it as a quasi-binding instrument could have a bearing on the topic of identification of customary international law, which was part of the Commission's current programme of work. He asked whether the relevant information on domestic court practice being gathered by CAHDI would be made available on its website, as useful potential evidence of *opinio juris*.

Ms. Requena (Council of Europe) said that the information received from States would remain confidential for the time being, as CAHDI working documents, although access could be granted to members of the Commission. In due course, it was quite possible that the information would be circulated more widely, subject to the relevant consents.

The Chair said that the level of interest among States in the work of CAHDI, as evidenced by the large number of replies received to its questionnaire on immunity, was encouraging. It was also interesting to note that Council of Europe conventions were ratified by non-member States from as far afield as Latin America, Africa and Asia.

Organization of the work of the session (agenda item 1) (*continued*)

The Chair said that, in order to take into account the availability of special rapporteurs, the Bureau had had to propose several changes to the programme of work. Having highlighted the changes, he took it that the Commission agreed to approve them.

It was so decided.

The meeting rose at 1 p.m.